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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1979

No. 79-5178

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

# REPLY TO OPPOSITION

MARSHALL W. KRAUSE,
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Blvd.
Larkspur, CA 94939
Telephone: (415) 461-4100

Attorneys for Petitioner.

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No. 79-5118

ROGER COLLINS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

REPLY TO OPPOSITION

I

THE CHALLENGED JURY INSTRUCTION MUST FALL UNDER SANDSTROM v. MONTANA

Many of the grounds upon which respondent urges this court to distinguish Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. ___, 61 L.Ed.2d 39 (1979) from petitioner's case have already been examined in the Sandstrom opinion. Respondent argues that instructions on the presumption of innocence and the burden of proof of the prosecution remove the constitutional error created when the jury was instructed that it could presume criminal intent from the acts of the defendant. (R.T. 327-328.) But this court has already handled this problem in footnote 7 of the Sandstrom opinion:

> The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proven beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

This court pointed out in Sandstrom that the common definition of "presume" as found in Webster's New Collegiate Dictionary (1974) is "to suppose to be true without proof." Perhaps even more damning to the respondent's argument is the definition of presumption given by the trial court to this jury:

> A presumption is a conclusion which the law draws from given facts. (R.T. 327.)

A "conclusion" is of course the final result or decision, a term of great consequence to a jury.

This court in Sandstrom was very clear that allowing a jury to presume a vital element of the prosecution case as a legal conclusion from other facts which were not rebutted is, and has historically been, to deprive a defendant of his constitutional right to require the government to prove its case beyond a reasonable doubt. The court stated at 61 L.Ed. 45:

> Sandstrom's jurors were told that "the law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory. [Citing cases]

This same thought was put in another way at 61 L.Ed.2d 50:

> Upon finding proof of one element of the crime (causing death), and of facts sufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," 397 U.S. at 364, and defendant was deprived of his constitutional rights as explicated in Winship.

Strangely, respondent insists that "the jury was instructed in unambiguous terms that the criminal intent may not be presumed." (Respondent's Brief, p. 5.) Yet on the preceeding page of respondent's brief the trial court's instruction on criminal intent is quoted:

> It [criminal intent] may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proven circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts. R.T. 328, emphasis added.)

This instruction coming on top of the instruction presuming a person of sound mind and discretion to intend the natural and probable consequences of his acts makes an even stronger case for constitutional error than Sandstrom. The fact that there were other instructions which the jury might have followed to obtain a correct view of the law is of no moment, as Sandstrom holds. (61 L.Ed.2d at 51.)

II

PETITIONER'S SENTENCE IS ARBITRARILY DISPROPORTIONATE TO THAT OF HIS CO-DEFENDANT

One of the responses made to petitioner's argument that the arbitrariness of his death sentence is demonstrated by the life sentence given to his equally if not more culpable co-defendant, Durham, is that the argument was not presented to the Georgia courts. (Respondent's Brief, p. 10.) This argument illustrates the respondent's failure to comprehend the duty of the Georgia Supreme Court in death penalty cases after this court's decision in Furman v. Georgia (1972) 408 U.S. 238. The arbitrary discrimination petitioner complains of was not in the decision of the jury in either his case or Durham's case. It is the arbitrariness of the Georgia Supreme Court in failing to reduce his sentence in the light of the sentence given to his co-defendant. Of course, the Georgia Supreme Court was fully cognizant of both sentences and discussed the facts of both in its opinion. Its decision only became arbitrary when it refused to make the sentences rational.

What the Georgia Supreme Court did is merely point out facts which tend to show that petitioner was not a bystander but was an active participant in the crime. However, it failed to compare these facts with the participation of Durham. Obviously, some comparison has to be made under this court's decision in Gregg v. Georgia (1976) 428 U.S. 153 if the anticipated even-handed application of the Georgia statute is to be a reality. It was the duty of the Georgia Supreme Court not to decide whether petitioner was fully culpable but to

decide whether he was so much more culpable than his co-defendant as to justify a death sentence in the face of the sparing of the life of his co-defendant. This duty was performed by the Georgia Supreme Court in Hall v. The State, 241 Ga. 252, 244 S.E.2d 833 (1978) but ignored in petitioner's case.

## III

## VAGUENESS: ADEQUACY OF COUNSEL

Respondent fails to respond to our argument that aggravating circumstance no. 7 under the Georgia statute is unconstitutionally vague. Indeed, it is difficult to defend a statute from a charge of vagueness which has as its operating words the rhetorical term "depravity of the mind." Depravity is where one sees it, but we doubt that the phrase can be defended as a divider between life and death.

Another point not argued by respondent is the adequacy of petitioner's trial counsel.[1] Respondent does not deny that facts of great moment concerning petitioner and his defense were either kept from the jury entirely or presented to the jury at the most awkward and insulting time so as to contradict and mock this court's holdings in Woodson v. North

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[1] Respondent contents itself with stating that this point was not raised before the Georgia Supreme Court. When the Georgia Supreme Court engages in the practice, as it did in this case, of allowing appointed trial counsel to be appointed appellate counsel, we can hardly expect that appellate counsel will be very critical of trial counsel. Evidently respondent believes that the more inadequate counsel is on appeal the more insulated from constitutional review will be the inadequacy of trial counsel.

Carolina (1976) 428 U.S. 280, 304 and Lockett v. Ohio, ___ U.S. ___, 57 L.Ed.2d 973, 987 that a jury considering the death sentence must have an adequate picture of the defendant's character, background and motivation. Only defense counsel can be expected to perform this task. Petitioner's defense counsel deprived petitioner of his chance to not be the victim of an arbitrary death penalty decision. Now we ask that this court make it clear to the Nation that counsel in death penalty cases must actively seek and present to the jury the mitigating factors in their client's backgrounds.

IV

CONCLUSION

For the reasons stated this court should review the conviction and death penalty sentence of Roger Collins by issuing its writ of certiorari to the Supreme Court of Georgia.

Dated: September 21, 1979

Respectfully submitted,

KRAUSE, TIMAN, BASKIN, SHELL & GRANT

By MARSHALL W. KRAUSE
MARSHALL W. KRAUSE

CERTIFICATE OF SERVICE

I hereby certify on this 21st day of September, 1979, that copies of this Reply to Opposition were mailed, postage prepaid, to:

Daryl A. Robinson
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334

MARSHALL W. KRAUSE